



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Jeff Timmer
520 Seymour Avenue
Lansing, MI 48933

NOV 17 2009

RE: MUR 6163
Houghton County
Democratic Committee

Dear Mr. Timmer:

This letter is in reference to the complaint you filed with the Federal Election Commission on February 4, 2009, concerning potential violations of the Federal Election Campaign Act of 1971, as amended, by the Houghton County Democratic Committee ("the Committee").

After considering the circumstances of this matter, the Commission determined to dismiss this matter and closed the file on November 3, 2009. At the same time, the Commission cautioned the Committee to ensure compliance with 2 U.S.C. §§ 441d and 434c in the future. The Factual and Legal Analysis explaining the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 **RESPONDENT:** Houghton County Democratic Committee

MUR 6163

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7 **I. GENERATION OF MATTER**

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9 This matter was generated by a complaint filed with the Federal Election Commission by
10 Jeff Timmer on behalf of the Michigan Republicans. *See* 2 U.S.C. § 437g(a)(1).

11 **II. FACTUAL SUMMARY**

12 The complaint alleged that the Houghton County (Michigan) Democratic Committee
13 ("HCDC" or "the Committee"), a local party committee of the Michigan Democratic Party, has
14 failed to register with and report to the Federal Election Commission ("the Commission") as a
15 federal political committee despite exceeding the threshold for federal political committee status
16 by making expenditures of over \$1,000 for a flyer, a newspaper advertisement, and radio ads that
17 "promoted or supported" the election of federal candidates Barack Obama, Joe Biden, Carl
18 Levin, and Bart Stupak, in violation of 2 U.S.C. §§ 433(a) and 434 of the Federal Election
19 Campaign Act of 1971, as amended ("the Act"). Complaint at 2-3. In addition, the complaint
20 alleged that the HCDC's "public communications ... probably failed to include the appropriate
21 disclaimer in violation of 2 U.S.C. § 441d(a)." Complaint at 4.

22 The response asserted that the Committee's federal expenditures did not meet the \$1,000
23 threshold for expenditures and that its exempt activities did not meet the \$5,000 threshold for
24 exempt activities. *See* 2 U.S.C. §§ 431(4)(C) and 431(9)(B)(iv). The response does not address
25 the disclaimer allegations. The available information indicates that if the total amount of the
26 HCDC's expenditures did exceed the Act's thresholds requiring registration and reporting as a
27 political committee, they did so by only a modest amount. *See* 2 U.S.C. § 431(4)(C). However,

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1 it does appear that the Committee failed to place a disclaimer on its newspaper insert and failed
2 to report independent expenditures. Nevertheless, for the reasons set forth below, the
3 Commission exercises its prosecutorial discretion to dismiss the complaint with a cautionary
4 letter to the Houghton County Democratic Committee. *See Heckler v. Chaney*, 470 U.S. 821
5 (1985).

6 **III. LEGAL ANALYSIS**

7 The complaint alleges that only federal funds were permitted to be utilized by the HCDC
8 for a newspaper advertisement, radio ads and flyers that promoted or supported the federal
9 candidates Barack Obama, Joe Biden, Carl Levin and Bart Stupak, and that the costs of such
10 "public communications" constitute expenditures under the Act for which only federal funds
11 may be spent. Complaint at 2-3. As a result of spending \$1,682.00 on these communications,
12 plus another \$397.20 spent on Barack Obama yard signs, the complaint concludes that the
13 HCDC spent more than \$1,000 on expenditures during 2008 and thus met the Act's political
14 committee status threshold. *Id.* at 3.

15 **A. Political Committee Status**

16 The HCDC appears to meet the definition of a "local committee of a political party," that
17 is, an organization that by virtue of the by-laws of a political party or the operation of State law
18 is part of the official party structure, and is responsible for the day-to-day operation of the
19 political party at the level of city, county, neighborhood, ward, district, precinct, or any other
20 subdivision of a State. 11 C.F.R. § 100.14(b). The name of the Committee, the activities that the
21 HCDC undertook during the 2008 campaign as detailed in the complaint and the response, and
22 the identification of itself on the slate card as "[y]our Houghton Democratic Party" all appear to
23 support the identification of the HCDC as a local committee of a political party. Moreover, the

HCDC files state disclosure reports as a political party committee. Any local committee of a political party which receives contributions aggregating in excess of \$5,000, makes \$5,000 in payments exempted from the definition of contribution or expenditure, makes contributions aggregating in excess of \$1,000, or makes expenditures aggregating in excess of \$1,000 during a calendar year meets the definition of a political committee. 2 U.S.C. § 431(4)(C). Political committees must file a Statement of Organization with the Commission within 10 days of meeting the threshold definition found in 2 U.S.C. § 431(4)(C), and must file reports that comply with 2 U.S.C. § 434. 2 U.S.C. §§ 433(a), 434(a)(1); *see also* 11 C.F.R. §§ 102.2, 104.1, 105.4.

1. Expenditures

a. Newspaper Insert

Citing the Committee's Michigan Bureau of Elections reports (attached to the complaint), the complaint alleges that the HCDC made expenditures of \$530 for a public communication that appeared in the *Daily Mining Gazette* and \$300 for a public communication referred to as a "flyer," which both "promoted or supported ... candidates for Federal office" as well as the election of clearly identified federal candidates as well as state and local candidates. Complaint at 2-3, ¶¶ 7, 11. The response states that both of these payments were for distribution of copies of a "slate card" that were inserted into copies of the *Daily Mining Gazette* for general distribution. Response at 2. The response asserts that these expenses can be allocated on a time/space split, which the response states is \$257.30 for the federal portion of the \$830 total costs, as there were four federal candidates listed among the total of thirteen candidates equally promoted on the flyer.¹ Response at 2.²

¹ Four-thirteenths of \$830 is actually \$255.38, rather than \$257.30.

² The response refers to the newspaper insert as a "slate card" and attempts to distinguish it from "a public communication such as an ad in the *Daily Mining Gazette*," *see* Response at 2. Under the Commission's

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1 In determining whether an organization makes an expenditure, the Commission "analyzes
2 whether expenditures for any of an organization's communications made independently of a
3 candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
4 definition at 11 C.F.R. § 100.22(b)." See Political Committee Status: Supplemental Explanation
5 and Justification, 72 Fed. Reg. 5595, 5606 (February 7, 2007). The newspaper insert contains
6 express advocacy under 11 C.F.R. § 100.22(a) because the insert reads "Remember to Vote!
7 Tuesday, November 4! Your Houghton Democratic Party is proud to present the 2008
8 Democratic nominees" and then includes a list of Democratic candidates, listing Barack Obama,
9 Joe Biden, Carl Levin, Bart Stupak (four federal candidates) along with nine State and local
10 Democratic candidates. The use of the word "Vote" next to the list of Democratic nominees in a
11 newspaper advertisement presented by the Houghton Democratic party is, in effect, the same as a
12 communication that says "Vote Pro-Life" preceding a list of candidates identified as "pro-life."
13 See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238
14 (1986) ("MCFL") (a communication is express advocacy when "it provides, in effect, an explicit
15 directive" to vote for the named candidates). The HCDC is reminding the public to vote and to
16 remember those candidates it has nominated for the offices up for election (*i.e.*, endorsed as
17 Democratic). In a similar way, Massachusetts Citizens for Life included in its communication
18 both a call to vote and listing of candidates it endorsed as pro-life. That the ads in MCFL said
19 "Vote Pro-Life," and this communication says "Remember to Vote!" followed by HCDC's
20 declaration that it "is proud to present the 2008 Democratic nominees" is a distinction without a
21 difference. Both communications "provide[d] in effect an explicit directive: vote for these

regulations, however, the slate card exemption does not apply to candidate lists that appear in a newspaper. See 11 C.F.R. § 100.80 (stating that the slate card exemption does not apply to the costs of "the preparation and display of listings made on broadcast stations, or in newspapers, magazines, and similar types of general public political advertising"). Therefore, regardless of how the newspaper insert is characterized, it does not constitute exempt activity.

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(named) candidates." *MCFL*, 479 U.S. at 249. Accordingly, under 11 C.F.R. § 100.22(a), the newspaper insert appears to constitute express advocacy.³

Because the newspaper insert contained express advocacy, the costs associated with the newspaper advertisement are therefore expenditures under the Act. HCDC's response to the complaint argues that only the costs associated with the federal portion of the advertisements count towards the \$1,000 expenditure threshold. See 11 C.F.R. § 106.1(a)(1) and (c)(3). The HCDC newspaper insert mentions both federal and state candidates. The HCDC calculated the allocation between federal expenditures and non-federal disbursements on a space ratio basis, resulting in 4/13 of the \$830 spent by the HCDC on the newspaper inserts, or \$255.38, counting toward the \$1,000 threshold for political committee status. See 2 U.S.C. § 431(4)(C).

b. Radio Advertisements

Again citing the Committee's Michigan Bureau of Elections reports attached to the complaint, the complaint alleges that the HCDC spent \$234 for radio ads on Eagle Radio, \$220 for radio ads on Heartland Communications, and \$198 for radio ads on radio station WMPL are expenditures counting toward the HCDC's political committee status threshold. Complaint at 2-3, ¶¶ 8-10. The Committee asserts in response that these payments went toward six radio ads, of which only three mentioned a federal candidate. Response at 2. The Committee calculates \$324.50 – the cost of the three ads referencing federal candidates – as what the response terms "federal election activity" and "federal expenditures." *Id.* Neither the complaint nor the response included transcripts or recordings of these radio advertisements, so the Commission cannot independently verify at this time which radio ads addressed federal candidates or whether

³ As this language clearly constitutes express advocacy, as defined in Section 100.22(a) and by the Supreme Court in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), an analysis of this communication under Section 100.22(b) is unnecessary.

these advertisements expressly advocated the election of such candidates. However, even if the entire cost of all the radio ads, \$652.00, is added to the amount calculated above as the federal portion of the newspaper inserts, \$255.38, the total is \$907.38, less than the \$1,000 political committee status threshold in the form of expenditures. See 2 U.S.C. § 431(4)(C). Finally, even if the entire \$1,482.00 costs of the Committee's radio and newspaper ads counted toward the \$1,000 threshold, the Committee's expenditures would have exceeded the threshold by only a modest amount that would not warrant the further use of Commission resources to pursue.

2. Exempt Activity

The complaint further alleges, in reliance on the Committee's Michigan Bureau of Elections reports, that the HCDC made additional expenditures of \$200 for a flyer and \$397.20 for Obama yard signs. Complaint at 2-3, ¶¶ 6 and 12. The response asserts that the \$200 flyer was a slate card distributed door-to-door by volunteers, and therefore qualifies as exempt party materials exempted from the Act's expenditure definition and subject to a \$5,000 threshold before political committee status is triggered. Response at 1; see also 2 U.S.C. §§ 431(4)(C) and 431(9)(B)(iv); 11 C.F.R. § 100.80. The response also asserts that the Obama lawn signs were distributed by volunteers and therefore are an exempt expense of \$397.20. Response at 1; see also 11 C.F.R. § 100.87.

As described, the slate card distributed by volunteers and the Obama yard signs distributed by volunteers appear to be materials or activities exempt from the definition of expenditure, and therefore the \$597.20 spent on those items should not be counted toward the \$1,000 threshold for political committee status in the form of expenditures. Instead, it should count toward the \$5,000 threshold for exempt activities, which is not met by the HCDC based on

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the available information. See 2 U.S.C. §§ 431(4)(C) and 431(9)(B)(iv); 11 C.F.R. §§ 100.80 and 100.87.

B. Permissible Funding

Regardless of whether a local party committee exceeds one of the registration thresholds making it a federal political committee, it must finance activities in connection with federal elections with funds that comply with the federal contribution limits and prohibitions. 11 C.F.R. § 102.5(b). The committee must demonstrate through a reasonable accounting method that it has received sufficient funds subject to the limitations and prohibitions of the Act to fund its federal expenditures and exempt activity. *Id.* The HCDC's response did not address the permissibility of the funds it used. However, the Michigan Campaign Finance Act has equivalent prohibitions and limitations to those in the Act, and therefore all of the HCDC's funds should be appropriate federal funds. See M.C.L. §§ 169.254, 169.242, and 169.244. Moreover, the Committee's Michigan Bureau of Elections Pre-General Election report, filed on October 25, 2008, appears to indicate that the HCDC had sufficient funds subject to the limitations and prohibitions of the Act, in that the report detailed year-to-date donations of \$6,369.50, none of which appear to have been in amounts greater than the Act's limits or to have been made by entities prohibited from making federal contributions. (Report available online at http://miboecfr.nictusa.com/cgi-bin/cfr/com_det.cgi?com_id=2193, last accessed on June 23, 2009). Accordingly, the HCDC appears to have made its expenditures and paid for its exempt activity with federally permissible funds.

C. Disclaimers

The complaint alleged that the HCDC's public communications "probably" failed to include appropriate disclaimers. Complaint at 4. The response does not address this allegation.

1 All public communications, as defined in 11 C.F.R. 100.26, that expressly advocate the election
2 or defeat of a clearly identified candidate must include appropriate disclaimers. 11 C.F.R.
3 § 110.11(a); *see also* 2 U.S.C. § 441d. Section 100.26 defines "public communications" as "a
4 communication by means of any broadcast, cable, or satellite communication, newspaper,
5 magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or
6 any other form of general public political advertising." 11 C.F.R. § 100.26. In this matter, the
7 slate card distributed by volunteers and the newspaper insert do not contain any disclaimers.

8 The portion of the slate cards that were distributed by volunteers in a door-to-door
9 canvass does not appear to be a public communication as defined by the Act, and therefore
10 would not require a disclaimer. *See* 11 C.F.R. §§ 100.26 and 110.11(a). The newspaper inserts,
11 however, appear to be a public communication by means of a newspaper. Also, as discussed
12 above, the newspaper inserts appear to expressly advocate the election of federal candidates.
13 Therefore, the newspaper inserts required, and failed to contain, a disclaimer stating that the
14 HCDC paid for the communication and whether or not the communication was authorized by
15 any federal candidate or candidate's committee. *See* 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(b).
16 Neither the complaint nor the response included a transcript or recording of the radio
17 advertisements, so we cannot determine whether the radio advertisements expressly advocated
18 for federal candidates and, if so, whether they contained conforming disclaimers. However, the
19 HCDC does appear to be in violation of 2 U.S.C. § 441d at least as to the newspaper inserts.

20 **D. Independent Expenditure Reporting**

21 The newspaper inserts also appear to be independent expenditures pursuant to 2 U.S.C.
22 § 431(17) because, as discussed above, they expressly advocate the election of clearly identified

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1 candidates, and the advertisements do not appear to have been made in cooperation, consultation,
2 or concert with, or at the request or suggestion of, a candidate, a candidate's authorized
3 committee, or their agents.⁴ 2 U.S.C. § 431(17). Under the Act, every person other than a
4 political committee who makes independent expenditures in excess of \$250 must file a report
5 that discloses information on its expenditures and identify each person who made a contribution
6 in excess of \$200 for the purpose of furthering an independent expenditure. *See* 2 U.S.C.
7 § 434(c). Even though the HCDC may not have exceeded the political committee status
8 threshold, it still would have been required to report, at a minimum, the \$255.38 expenditures for
9 the newspaper insert advertisements because they were independent expenditures of more than
10 \$250 for the 2008 general election. *See* 11 C.F.R. § 106.1(a)(1). Thus, the HCDC's failure to
11 report the independent expenditures appears to be a violation of the Act. *See* 2 U.S.C. § 434(c).

12 If the entire \$1,482.00 amount that the HCDC spent on its radio and newspaper
13 advertisements is counted as federal expenditures, the Act would require additional independent
14 expenditure reporting within 24 hours of the expenditure when independent expenditures
15 aggregate to \$1,000 or more after the 20th day, but more than 24 hours, before the date of an
16 election, regardless of whether the HCDC is a political committee. *See* 2 U.S.C. § 434(g). The
17 response does not give the dates of dissemination of the HCDC's newspaper insert
18 advertisements, nor does it give the dates of the radio advertisements. Therefore, it is not
19 possible at this time to determine whether the Committee failed to report those expenditures as
20 required by 2 U.S.C. § 434(g).

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⁴ As with the issue of whether the HCDC radio advertisements required disclaimers, it is not possible to determine at this time whether the radio advertisements were independent expenditures because the Commission does not have recordings or transcripts of the ads from which to determine whether the radio ads expressly advocate for the election of any federal candidate.

E. Conclusion

Although the HCDC may have violated 2 U.S.C. §§ 434(c) and 441d, due to the circumstances of this case including the modest amount in violation, pursuit of this matter would not merit the further use of Commission resources. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12545-6 (Mar. 16, 2007). Accordingly, the Commission exercises its prosecutorial discretion to dismiss the complaint with a cautionary letter to the Houghton County Democratic Committee. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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